# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

BOB SHOWERS WINDOWS AND SUNROOMS, INC.

and Cases 6-CA-34287

6-CA-34405 6-CA-34459 6-CA-34580

GREATER PENNSYLVANIA REGIONAL COUNCIL OF CARPENTERS a/w UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

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# **DECISION**

#### Statement of the case

IRA SANDRON, Administrative Law Judge. The amended consolidated complaint (the complaint), as further amended at the hearing without objection, stems from unfair labor practice (ULP) charges filed by Greater Pennsylvania Regional Council of Carpenters a/w United Brotherhood of Carpenters and Joiners of America (the Union) against Bob Showers Windows and Sunrooms, Inc. (Respondent or the Company). Briefly stated, the allegations relate to Respondent's subcontracting of unit work after the Union was certified, conduct at the bargaining table in negotiating a first collective-bargaining agreement, lockout of unit employees, and discharge of one employee and demotion of another.

Pursuant to notice, I conducted a trial in Clearfield, Pennsylvania, on August 16–19, 2005, at which the parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The General Counsel and Respondent filed helpful posthearing briefs that I have duly considered.

#### Issues

1. Did Respondent unlawfully subcontract bargaining unit work on and after April 15, 2004, by failing to give the Union notice and an opportunity to bargain?

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- 2. Did Respondent, by John Monti, its chief executive officer and chief negotiator, engage in surface bargaining without any intention of reaching agreement, during the course of negotiations that took place from October 2003 to April 2005?
- 3. Did Respondent's following actions constitute bad faith bargaining:

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- A. On October 21, 2004, informing the Union that Respondent would not make an economic proposal because the Union had filed ULP charges against it?
- B. On November 18, 2004, reneging upon its earlier agreements to various provisions, to wit, recognition of the Union, union security, vacations, and subcontracting?
- C. On February 22, 2005, insisting to impasse that employees ratify its last proposals on wages (offering remuneration on a "percent of contract" basis rather than by hourly rates) and on health insurance benefits?

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- 4. Was Respondent's lockout of all unit employees on March 1, 2005, pursuant to an unlawful declaration of impasse?
- 5. Did Respondent, by Martin Rebo III, production manager at all times material, discharge William Jones Jr. on August 14, 2004, because he supported the Union, or because he had taken three large pieces of aluminum coil from a jobsite to sell as scrap?
- 6. Did Respondent, by Rebo, when it recalled Ashley Cook on September 7, 2004, pursuant to the terms of a settlement agreement, demote him from crew leader to helper because he supported the Union, or because no crew leader positions were available? Related to this, did Rebo deny Cook a crew leader's wage increase because of his union support, or because he was no longer working as a crew leader and because Respondent no longer gave such increases?

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Based on the entire record, including the pleadings, testimony of witnesses and my observations of their demeanor, documents, and stipulations of the parties, I make the following findings of fact and conclusions of law.

35 Facts

When opposing witnesses present conflicting testimony, credibility determination becomes critical in ascertaining what "facts" occurred. On some matters, there was no dispute as to what was done or said. On others, witnesses offered directly contradictory testimony.

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Several factors make credibility resolution more problematic in this case:

1. Perhaps the single most important participant—Respondent's president and sole owner, Robert Showers—did not testify. Logic dictates the conclusion that he was the ultimate decisionmaker in determining Respondent's actions and the reasons they were taken, particularly when the record demonstrates that he had direct contact with employees concerning the Union. Simply put, I do not believe that during negotiations, Monti acted sua sponte and without Showers' direction and approval. No evidence was offered to rebut such an inference.

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2. Every witness had some sort of stake in the proceeding and therefore an interest in presenting his testimony in a light more favorable to either the Union or Respondent.<sup>1</sup>

- 3. The course of relevant events went back to mid-2003. It included numerous activities both at and away from the bargaining table and encompassed negotiations sessions that extended from October 2003 until April 2005, leading to natural diminunition of recall, particularly on specific incidents.
- 4. The parties' procedures during negotiations lent themselves to confusion. Thus, agreements on provisions were sometimes initialed off at the times they were reached but on other occasions were executed at the following meeting; sometimes, yellow highlighting was meant to show Respondent's disagreement with language proposed by the Union, but at other times, it was to present Respondent's own proposals; the system for color coding differences between the parties changed during the course of negotiations; copies were not initialed consistently; and working drafts were sent and edited electronically without a means of protecting against changes. In evaluating the credibility of testimony concerning what was said at negotiations, I have relied in part on Monti's notes of meetings from January 2004 on (GC Exh. 50) that were admitted without objection. They were prepared close in time to the actual meetings, and no contention was raised that they were not bona fide. I note in this regard that they were not always supportive of Monti's testimony. Naturally, they were prepared from his perspective and no doubt written in a manner that would favor Respondent on certain points, and in a few areas I do not find they accurately reflected what occurred.

This leads to an important aspect of my credibility resolutions. In evaluating witnesses based on their demeanor, the plausibility of their testimony, and all of the surrounding circumstances, I have credited key witnesses on some points but not others. In this regard, a witness may be found partially credible. The fact that a witness is discredited in one instance does not ipso facto mean that he must be discredited in all respects. *Golden Hours Convalescent Hospitals*, 182 NLRB 796, 799 (1970). Rather, it is appropriate to weigh the witness' testimony for consistency throughout with the evidence as a whole. Id. at 798–799; see also *MEM Electronic Materials*, 342 NLRB No. 119 fn. 13 (2004), quoting *American Pine Lodge Nursing*, 325 NLRB 98 fn. 1 (noting that when examining testimony, a trier of fact is not required "to accept the entirety of a witness' testimony, but may believe some and not all of what a witness says'"); *Excel Container*, 325 NLRB 17 fn. 1 (1997) (stating that it is quite common in all kinds of judicial decisions to believe some but not all of a witness' testimony).

Finally, on credibility, I draw an adverse inference against Respondent on any factual matters in the case about which its sole owner, president, and admitted agent Robert Showers likely would have knowledge. See *Daikichi Sushi*, 335 NLRB 622 (2001), *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. mem 861 F.2d 730 (6th Cir. 1988); *Martin Luther King Sr. Nursing Center*, 231 NLRB 15 fn. 1 (1977). In particular, Showers did not refute statements relating to the Union attributed to him by witnesses of the General Counsel, whose unrebutted testimony I credit.

<sup>&</sup>lt;sup>1</sup> Since all witnesses and other persons involved were men, the male gender will be used exclusively throughout this decision.

Respondent is a Pennsylvania corporation with its sole facility in Philipsburg, Pennsylvania, where it is engaged in the retail sale and installation of windows, sunrooms, doors, and other building products. Jurisdiction is admitted. Respondent's business is seasonal; the busy season extends from April to November, with the peak of work in the summer months.

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Prior to the March 2005 lockout, Respondent employed two categories of carpenters to install products—master carpenters aka crew leaders and assistant carpenters aka helpers. The former received a higher hourly wage and directed the helpers, who generally performed more of the heavy work. Most crews consisted of a crew leader and a helper. Assignments were for varying periods of time, depending on Respondent's needs and employees' preferences. Some crews did just windows, others just sunrooms, and some both. Some employees did some kitchens, and a couple did occasional siding.

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Employees were always paid an hourly wage. The Company also provided individual health insurance coverage through Geisinger and contributed 50 percent, up to \$100, to monthly premiums. Prior to their en masse layoff in July 2003, these employees used company trucks, and Respondent bore the costs of gas and maintenance. They were paid the hourly rate from the time they punched in to work until the time they punched out in the evening. They were also provided with company tools.

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The Union is an industrial union that has shop agreements with individual employers, as opposed to representing construction units and referring employees for hire. In 1997 and 2000, the Union met with Respondent's employees regarding representation. No petitions were filed.

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Shortly before employees met with the Union in the summer of 1997, Showers called employee Rick Yarger. Showers stated that he knew of talk of a union and of the scheduled meeting, that he would have someone watching, and that any employees seen attending the meeting would be fired. He further said that, like Sears, he would subcontract work, and men would be responsible for their own tools and work vehicles.

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Michael Dingey, a council representative for the Union, met with 18 crew leaders in 2000. He offered them jobs with another employer, and 16 in fact quit working for Respondent the next day. Showers called Dingey and said it was a "low-down dirty trick" that Dingey had played on him by taking them away. Dingey replied that he merely gave them an opportunity to find other employment. Showers said that he treated them well and could not understand why they would leave. Dingey responded that they wanted more than hours, i.e., health insurance and pensions. Dingey offered to review union contracts with him, but Showers said he was not interested.

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In about February 2003, Rebo met with employees and presented them with a program that would reduce their hourly wage but provide them with a commission based on percentage of job, as well as have them purchase and use their own trucks and receive compensation for mileage.<sup>2</sup> The program was to begin on a voluntary basis, with the hope that it would become companywide within 18 months. Only one employee expressed an interest in this new program, but, Rebo testified, "it didn't work out."

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<sup>&</sup>lt;sup>2</sup> See Jt. Exh. 5, which is undated. Cook corroborated Rebo's testimony that it was distributed to employees before the Union's 2003 organizational activities.

In the spring of 2003, the Union began organizing activities. Prior to the election, Showers and Rebo had several meetings at the facility with Cook and his brother AI, another employee.<sup>3</sup> In all of them, Showers basically propagandized against the Union. In addition, at least at the first meeting. Showers also stated that "no good would come from having a [union] contract."4

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An election was conducted on July 8, 2003, in Case 6-RC-2227, at which all but one of the 22 employees who voted without challenge voted for the Union. With one exception, all employees who voted wore bright orange "Union Yes" T-shirts to the election.

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On July 11 and 12. Respondent entered into its first two subcontracting agreements it has made with independent contractors.5

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The Union was certified on July 21, 2003, as the exclusive collective-bargaining representative of Respondent's full-time and regular part-time master carpenters (aka crew leaders) and assistant master carpenters (aka helpers) employed at the Philipsburg. Pennsylvania facility (the unit), excluding all office clerical employees and guards, professional employees and supervisors.

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On about that same date, Yarger had a 45-minute conversation with Showers and Robin Gray, Respondent's sales manager, in Showers' office.<sup>6</sup> Showers stated that he had been advertising for subcontractors even before the Union was voted in, had subcontracted in the past, and this was the way he would always run his business. He said he already had a small army of subcontractors at his disposal, they were more efficient than the hourly crews, and he was very pleased with their performance. Showers further stated that he would negotiate in good faith but if the Union did not offer him a better deal than he was getting from the subcontractors, he would not deal with the Union. He mentioned that he had lost \$100,000 in labor costs the previous years and cited employee crews sleeping on the job.

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At some point, Showers also said:7

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[H]e had scheduled meetings with all the carpenters, before the election, for their benefit, and they had their chance, and they made their decision, and now he [was] through with them. He then said that the Union tarnished the vote by handing out T shirts prior to employees going to vote, and only one guy refused to wear [it], and he named his name, Mark Bonfardine.

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<sup>&</sup>lt;sup>3</sup> I credit Cook's unrebutted testimony on these meetings. Even though Respondent called Rebo as a witness, he did not address them.

<sup>&</sup>lt;sup>4</sup> Tr. 171.

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<sup>&</sup>lt;sup>5</sup> See GC Exhs. 65 & 62, respectively. Respondent submitted no documentary evidence that it signed any such agreements prior to July 11, 2003. Respondent's last subcontracting agreement was signed on April 4, 2005 (GC Exh. 67).

<sup>&</sup>lt;sup>6</sup> I credit Yarger's unrebutted testimony about the meeting. Respondent called Gray as a witness, but he did not testify about it.

<sup>&</sup>lt;sup>7</sup> Tr. 427.

Later that month, Respondent laid off all unit employees and subsequently used subcontractors to perform carpentry work, including kitchen refacing or remodeling. The Union filed charges, which were the subject of a settlement agreement executed January 15, 2004,8 and approved by the Region. At the trial, Respondent presented no evidence on the reasons for the mass layoff.

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Respondent agreed therein to reinstate all terms and conditions of employment as they existed on July 8, 2003; to offer to all unit employees (with three exceptions) reinstatement to their former positions without prejudice to their seniority rights; and to pay them a total of \$50,000 to make them whole. Respondent would recall all laid-off employees by April 15, 2004, and send out offers of reinstatement no later than March 1, consistent with manpower needs. An employee would be required to accept the offer within 2 weeks of the date of his letter.

As to subcontracting, Respondent agreed to:

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[C]ease using subcontractors to perform work traditionally performed by unit employees, excluding siding and basements. Therefore, the Respondent will have no limitation with regard to the subcontracting of work outside of the installation of Four Seasons sunrooms, new kitchens or the installation of replacement windows.<sup>10</sup>

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Since Respondent had sold the tools used by unit employees, the agreement further provided that subcontractors performing bargaining unit work could continue working until Respondent reacquired tools necessary for unit employees to perform the work.

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Additionally, Respondent agreed to recognize the Union as the exclusive representative of unit employees and "to bargain in good faith on all mandatory terms of bargaining with an intent to reach an agreement." A schedule for negotiations was set out, with the first meeting to occur during the week of January 26 for 3 hours, followed by one meeting each of the following successive 6 weeks, each meeting to last 3 hours. The parties also agreed to negotiate a minimum of 18 total hours by the week beginning March 8, with negotiations thereafter to be scheduled.

## **Negotiations and Intervening Events**

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The course of negotiations was a protracted one, stretching from October 2003 until April 2005. As noted earlier, the parties' procedures were not always consistent and sometimes lent themselves to confusion. Monti was basically the Respondent's sole negotiator, and Richard Queer, the Union's council representative out of Pittsburgh, was the Union's chief negotiator.

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The parties held at least three meetings in late 2003: on about October 10, October 30, and November 10. At the second of these, the Union presented its first proposal. It proposed paid holidays, vacations, and bereavement pay and unspecified hourly wages rates, and left health care insurance blank as far as program and benefits.<sup>11</sup>

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<sup>&</sup>lt;sup>8</sup> GC Exh. 2 (Case 6–CA–33576).

<sup>&</sup>lt;sup>9</sup> Jt. Exh. 11, Cook's recall letter, is a sample.

<sup>&</sup>lt;sup>10</sup> Respondent and the Union later disagreed on whether the term "new kitchens" includes refacing of customers' existing kitchen cabinets or applies only to pulling out and replacing old cabinets with new ones. The facts on this issue will be set out in a separate subsection.

<sup>&</sup>lt;sup>11</sup> Jt. Exh. 6.

At the November 10 meeting, Respondent made its first proposal, including a provision that employees be compensated at 5 percent of a job's contract price, divided equally among employees assigned to the job; unpaid holidays, vacations, and bereavement pay; and Respondent paying 50 percent of an employee's individual health care premium up to a maximum of \$100 a month (what it had been paying at the time of the layoff).<sup>12</sup> At this meeting, Queer requested that Respondent provide job comparisons of performance by hourly employees vis-à-vis subcontractors.<sup>13</sup>

Negotiations resumed in January 2004, following execution of the earlier-referenced settlement agreement. At the first of these, on January 30, the parties agreed on broad concepts for the framework of negotiations, as reflected by Monti's February 2 e-mail to Queer. Monti and Queer further agreed that when agreement was reached on a particular item, it would be initialed and dated.

We have two versions of what the parties signed off on at the February 12 meeting: Respondent's Exhibit 24 and General Counsel's Exhibits 4 and 5. They are consistent in showing agreement (i.e. Monti's and Queer's initials and the date February 12, 2004) on coverage (art. 1.1): "The parties recognize that the work historically performed but not limited to, by the employees has been residential installation of windows, sunroom product lines including repair and service work of those products."

However, in Respondent's version, union security provisions were agreed to (art. 3), with the exception of the word "jurisdiction" in 3.2, which was highlighted; in the Union's version, agreement was reached on the entire article. Similarly, in Respondent's version, the words "or may in the future" were highlighted in the section on recognition (2.1) to show Respondent's disagreement, but the Union's corresponding copy (GC Exh. 5) showed full agreement on recognition. In light of superseding events at later negotiations, I find it unnecessary for purposes of this decision to make a finding as to which parties' documents were accurate.

At the February 12 meeting, the parties also signed a memorandum of agreement including the position of service technician in the bargaining unit but excluding the position of measure technician.

On February 19, the parties agreed on 401(k) retirement, business travel expense reimbursement, subcontractor clause, and various other provisions. <sup>15</sup> As to subcontracting, the following language was agreed to:

21.1 The Employer agrees not to sublet or subcontract any construction work or alteration work to any person, firm or corporation which is traditionally performed by bargaining unit employees i.e,: sunroom and replacement window installations and new kitchens.

21.2 The Employer may assign work previously done by subcontractors given the employees [sic] skill and ability to perform the duties of the job, i.e.: siding and basements.

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<sup>&</sup>lt;sup>12</sup> Jt. Exh. 1.

<sup>&</sup>lt;sup>13</sup> Referenced in an undated letter from Monti to Quinn, R. Exh. 23.

<sup>&</sup>lt;sup>14</sup> GC Exh. 27

<sup>&</sup>lt;sup>15</sup> R. Exh. 25 & GC Exh. 6. In these documents, Monti's and Queer's initials by a deleted section (21.3) are at different places, suggesting that they were not inserted at the same time.

At this meeting, Respondent said it wanted compensation based on percentage of contract. The Union expressed strong disagreement and the desire for hourly wages. It agreed to submit a proposal at the next meeting.

By an e-mail from Queer to Monti on February 23,<sup>16</sup> the Union presented its economic proposals, including an hourly rate, plus contributions into union pension and other funds, and medical benefits.

At the February 26 meeting, Monti stated that Respondent still wanted percentage of contract to control costs and discussed with the Union the reasons why controlling them was difficult. The parties also discussed the recall of installers and procedures for transportation to iobsites. Subsequent meetings were held on March 3, March 10, and March 25.

Pursuant to the terms of the January 15, 2004 settlement agreement, laid off employees who wished to return went back to work on April 15. The parties stipulated that Respondent made certain changes in their working conditions as compared to before the layoff. On a majority of jobs lasting a day or more, the new procedure was that one employee would drive Respondent's panel truck to the jobsite, while the other(s) would take his personal vehicle. If the job lasted over one day, the panel truck would be left at the jobsite and the employees would leave in the personal vehicle. They would then commute back and forth in their own vehicles, entirely at their own expense. They were no longer paid for travel time.

On April 19, Rebo signed an agreement for a subcontractor to perform window installations for Respondent.<sup>17</sup> On April 27, he signed an agreement with a subcontractor to perform a sunroom installation job, which work was started on April 29 and completed on May 11.<sup>18</sup> On April 28, Rebo signed an agreement with another subcontractor, again to install a sunroom, which job was also started on April 29 and completed on May 7.<sup>19</sup> Prior to June 10, the date the parties reached agreement on subcontracting of windows and sunrooms, Respondent contracted out three additional sunroom installation jobs.<sup>20</sup>

Monti testified that he alone made the decision to hire subcontractors at this time and that the problem was mainly with sunroom work "because we had lost our talent." Rebo testified that he did not assign more window installers to perform sunroom installations in 2004 because he did not want performance problems. I note in this regard that Respondent provided sunroom training to its subcontractors in 2004, although none of its employees were afforded such. Monti further testified that he told Rebo to hire as many carpenters as possible because of Respondent's backlog.

At the May 5 meeting, the Union expressed concern over the cost of gas and the men having to report directly to jobsites in their own vehicles.

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<sup>45 &</sup>lt;sup>16</sup> GC Exh. 9.

<sup>&</sup>lt;sup>17</sup> GC Exh. 75 at 1. The operative date used by the General Counsel for the alleged violation is April 15, 2004, so subcontracting before that date need not be described in detail.

<sup>&</sup>lt;sup>18</sup> GC Exh. 71 at 1–2.

<sup>&</sup>lt;sup>19</sup> GC Exh. 71 at 3–4.

<sup>&</sup>lt;sup>20</sup> GC Exh. 71 at 5–12.

In the articles of agreement through May 6, Respondent highlighted "or may in the future" under union recognition and within "the jurisdiction of [the union]" under jurisdiction,<sup>21</sup> thus limiting the application of those provisions to employees at Respondent's only existing facility in Philipsburg. The articles contained no specific provisions for wages, furnishing of transportation or tools, or health benefits.

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In the articles of agreement though May 19, the same words were highlighted.<sup>22</sup> Respondent continued to propose compensation be 5 percent for each job, divided equally among all employees, and continued to propose that medical insurance benefits remain unchanged. As opposed to its previous proposal, Respondent now offered to provide employees with a trailer to haul materials. The Union's responses were indicated in blue print.

At the May 19 meeting, Respondent first discussed its use of subcontractors to remedy its backlog, especially in sunrooms. The Union responded that the reason there were not enough employees to do sunroom work was that they were quitting in response to the new policy that they drive in their own vehicles to worksites. Monti proposed an automobile allowance of \$20 a day for employees who used their own transportation, and the Union countered with \$30 a day.

Monti's notes stated that the Union agreed Respondent could use subcontractors to catch up on the backlog, provided no hourly employees were laid off and Respondent continued to aggressively hire new employees to reduce the need to subcontract. However, I cannot find there was such an agreement in light of the fact that the Union filed ULP charges that same day regarding Respondent's change in transportation policies—a topic that was linked to discussion of subcontracting. Moreover, Monti's May 29 letter to Queer expressed the Company's prospective intent to use subcontractors and stated, "[W]e would like to discuss the matter with the union"<sup>23</sup>—inconsistent with Monti's testimony that they had reached agreement on the subject on May 19.

In that letter, Monti stated that Respondent was putting the Union on notice of its intent to hire subcontractors on a temporary basis. He explained that the Company was faced with a cash flow problem as a result of the backlog of work not being performed and the loss of 50 percent of the work force in the last several weeks.

In early June, Rebo signed agreements with two different subcontractors to install windows.<sup>24</sup> He testified this was because Respondent had a shortage of carpenters to perform such work. Respondent did not provide evidence of the payroll for the first 3 weeks of June.<sup>25</sup>

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<sup>&</sup>lt;sup>21</sup> Jt. Exh. 7.

<sup>&</sup>lt;sup>22</sup> Jt. Exh. 8.

<sup>&</sup>lt;sup>23</sup> R. Exh. 21.

<sup>&</sup>lt;sup>24</sup> GC Exh. 75, at 4, 9.

<sup>&</sup>lt;sup>25</sup> GC Exh. 49 contains payroll hours for the weeks ending June 26 through December 18, 2004. For the first week, 18 employees worked an average of 41.25 hours. Over the entire period, employees worked an average of 40 hours or more on 11 weeks, and less than an average of 40 hours on 15 weeks. It has to be assumed that had there been no subcontractors doing unit work, employees would have had more hours, although a precise calculation is impossible.

The Union responded to Monti by letter dated June 2, in which Queer voiced opposition to Respondent's hiring subcontractors when there were employees available to do the work.<sup>26</sup>

At the June 10 meeting, the parties entered into an agreement on "temporary arrangements" to continue smooth operations and smooth good faith bargaining, as part of which the Union agreed to withdraw its ULP charges regarding changes in transportation arrangements.<sup>27</sup> It provided that installers would be paid \$25 for each day they traveled to a job using their own personal vehicles. Further, such installers would be paid hourly for travel time one way to a jobsite. Six employees had quit because of having to use their own vehicles, and Respondent agreed to offer them reinstatement (only two of them returned, and within 2 weeks, both had quit again).

The agreement also provided that in recognition of the company's backlog and to reduce the need for subcontractors, the Union would refer "supplemental" carpenters to the Company, which would have the right to hire or refuse to hire anyone so referred. Further, Respondent would "make every effort" to hire new hourly installers as regular employees.

Monti requested that Dingey contact Rebo to make arrangements for the latter to conduct interviews of individuals whom the Union referred. Monti testified that he later told Rebo to work closely with Dingey to get as many supplemental carpenters as possible.

In the July to October time period, Dingey sent Rebo about a dozen candidates, of whom two were hired (although one of them did not show up for work). Dingey also sent Rebo a "blind" referral, who told Rebo he was responding to Respondent's newspaper ad. Rebo hired him. Rebo testified that he interviewed about 10–20 applicants who responded to Respondent's ads for help in 2004 and that he had trouble finding experienced people, especially during the busy season. During the period June 11–July 27, he hired at least two people who responded to such ads.<sup>28</sup> For purposes of this decision, I need not determine Rebo's motives for rejecting most of the candidates Dingey referred.

At the following negotiations meeting, on July 29, Monti expressed concern on economic areas of the contract and suggested that the wages the Union had on the table, together with health insurance, was a serious difference, even aside from pensions. Monti also stated that operations had improved.

On the morning of July 30, Monti send a revised working agreement to Queer with a cover e-mail stating:<sup>29</sup>

As we get closer to the more difficult issues I need to remind you that all language and economic issues that we discuss here forward will be conditional to a ratification of the contract. We will be agreeing or disagreeing to issues as a package from this point forward. [We] have moved on what we consider economic issues (Vacations, Bereavement, etc.) in an effort to continue moving in the right direction, however, all of those economic issues are contingent on a complete economic package and cannot be separated.

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<sup>&</sup>lt;sup>26</sup> R. Exh. 22.

<sup>&</sup>lt;sup>27</sup> GC Exh. 20.

<sup>&</sup>lt;sup>28</sup> See R. Exh. 5. Respondent hired a total of seven new carpenters in 2004, including the two Dingey formally referred and the one he "blindly" referred. See GC Exh. 29.

<sup>29</sup> GC Exh. 7.

Later that morning, Queer sent Monti an e-mail, saying Queer had drafted tentative agreements with the articles they had talked about at the meeting the previous day.<sup>30</sup> He stated that Dingey had heard the hours of the men were being cut back to 40 that week and had also heard that "there are quite a few kitchen jobs that are going out with subcontractors. This was still supposed to be our work?"

Monti's response was by e-mail that afternoon:31

Based on our forecast and scheduling with our vendors the work requirement will allow us to reduce the overtime . . . . [F]or now we feel 40 hours will control our labor costs, keep the installers employed and meet our vendor delivery schedule . . . .

As for kitchens, I mentioned before and our NLRB hearing clearly states we will not subcontract NEW KITCHENS. We have not sold one NEW KITCHEN since because they, for the last several years, have cause [sic] us problems. The kitchen work that we are currently doing is not replacing kitchen cabinets with NEW, but refacing the existing cabinets. This is a completely different product and process and is why we specified in the hearing NEW KITCHENS . . . . (Capitalization in original.)<sup>32</sup>

On August 5, the Union presented Respondent with a modified economic proposal.<sup>33</sup> It proposed reducing the travel allowance to \$10/day and "blacking out" \$100/month for current benefit contributions (\$.58/hr.), thereby reducing the cost of the Union's hourly wage package by \$2.46 an hour. Monti responded by e-mail of August 30, stating that the parties were "still very far apart."<sup>34</sup> He acknowledged the Union's attempt to move money from the car allowance to insurance but said that the cost of the Union's health insurance was simply too costly. Further, the Union's proposed hourly rate was "much more than we could possibly talk about." Monti pointed out that, as he mentioned at the outset of negotiations, Respondent was looking to control high labor costs.

At the September 7 meeting, Monti stated that the Union's revised wage/benefit proposal was "extremely out of range" and that the Company had no interest in the Union's healthcare, pension, annuity and savings or apprenticeship program because of costs. At this meeting, Dingey claimed that Respondent had no right to subcontract new kitchens. Monti responded that the Company no longer did new kitchens but only the refacing of existing kitchens. Dingey further claimed that Respondent was subcontracting sunrooms when its installers were working less than 40 hours a week. Monti replied that he would investigate but was confident it was not occurring. He further responded that the Union had not been successful in providing supplemental carpenters.

<sup>30</sup> R. Exh. 1.

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<sup>31</sup> Ihid

<sup>&</sup>lt;sup>32</sup> However, GC Exh. 76, records of work performed by subcontractors from March through December 2004, reflects that approximately 30 percent of their kitchen jobs entailed both installation of new cabinets and resurfacing/remodeling work.

<sup>&</sup>lt;sup>33</sup> GC Exh. 10. Monti's notes do not reflect an August 2004 meeting.

<sup>&</sup>lt;sup>34</sup> GC Exh. 28.

The articles of agreement through September 7 reflect that the parties continued to disagree over the language "or may in the future" in article 2.1, "within the jurisdiction" of the Union in 3.2, wage rates, and furnishing of tools.<sup>35</sup> Under holidays, there was a notation that the Company would provide information on which holidays it was agreeing to pay.

At the September 29 meeting, Respondent furnished the Union with the details of its Geisinger health plan, as the Union had requested. As to the format of working agreements, the parties agreed that black text would represent agreed-upon language; yellow, proposals by Respondent; and blue, union proposals and comments. The Union presented a revised wage and benefits proposal.<sup>36</sup> As with the August 5 proposal, it provided for a "blackout" for \$100/month current benefit contributions, but it eliminated completely the travel allowance, thereby reducing the cost of its proposed hourly wage package by \$3.71/hour.

Following this meeting, the Union further revised its wage proposal by agreeing to Respondent's current health insurance provider (Geisinger) but asking for family coverage, as well as individual coverage, and for \$1.30/hr. for individuals and more for families.<sup>37</sup>

The next meeting was on October 21. Monti presented a spreadsheet analysis of the Union's proposed package vis-à-vis present labor costs.<sup>38</sup> He explained the "catastrophic costs" of the Union's proposal in the area of benefit costs and stated that Respondent would not be able to continue to entertain the Union's proposed benefits. He reminded the Union that they were negotiating a contract because of the Company's efforts to reduce labor costs, not increase them. The Union stated that it was disturbed that Respondent did not have a formal counterproposal to the Union's latest offer, to which Monti responded that the issues were related to the economics of the contract. Respondent continued its opposition to certain language in the recognition and union security clauses.

It is undisputed that Monti brought up a ULP charge that had been filed concerning use of employees' personal vehicles and that the Union responded it was not aware of such. According to both Queer and Dingey, Monti said that the charges related to ex-employee Bill Morgan. However, Monti's notes stated that the Union said it would investigate, and his notes of the next meeting (November 18) stated that the Union then identified Morgan as the charging party.

Further, both Queer and Dingey testified that Monti said at this October 21 meeting that he could not make an economic proposal because of the charges, which statement Monti denied. We thus have a pure credibility issue here. There are no extrinsic factors present that would make either Queer and Dingey's or Monti's testimony more plausible.

However, even if Monti made the statement, his conduct at the October 21 meeting did not demonstrate a refusal to engage in discussion of economic matters. Indeed, he presented a detailed spread sheet and compared the costs of current and union-proposed benefits. Moreover, such statement had no adverse impact on the course of negotiations, for at the following meeting (on November 18), Monti presented a revised economic proposal. In these circumstances, I do not find any such statement to amount to a fact that would support a ULP.

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<sup>&</sup>lt;sup>35</sup> Jt. Exh. 3.

<sup>&</sup>lt;sup>36</sup> GC Exh. 11.

<sup>&</sup>lt;sup>37</sup> GC. Exh. 12, in which later modifications are shown.

<sup>&</sup>lt;sup>38</sup> R. Exh. 28.

Cook attended the October 21 meeting. He told Monti that the spreadsheet comparison of hourly employees vis-à-vis subcontractors was misleading; one of the jobs listed had been his and entailed major work beyond just window installation. Monti replied that the jobs were selected at random.

At the November 18 meeting, Respondent presented a revised contract proposal.<sup>39</sup> All of articles 2.1 and 3.2 were highlighted, reflecting Respondent's proposed language. Previously, Respondent had objected to the words "or may in the future" in article 2.1, thus limiting recognition to "all places of business which the Employer is now" (to wit, Philipsburg). This proposal changed the wording to specify that recognition be limited to employees at its Philipsburg facility.

As to article 3.2, Respondent had previously proposed that union security apply only to employees at the Philipsburg facility, striking the language "within the jurisdiction" of the Union. The proposal made no substantive change in this position but merely deleted "within the jurisdiction."

According to Queer, he told Monti that there was already tentative agreement on these items earlier in the year and that Respondent was reneging. Monti responded that particular language in them had always been disputed.

In article 19, regarding subcontractors, Monti's new proposal added a whole new section, 19.3, beginning with:

The parties recognize that the Employer has traditionally subcontracted bargaining unit work, (sunrooms, replacement window installations, and new kitchens) when the Employer has faced temporary shortage of manpower, or in exigent circumstances. Therefore, the Respondent shall be able to continue to use subcontractors to satisfy temporary manpower shortages, as long as no bargaining unit employees are on lay off at the time the Employer contracts for the services of the subcontractor.

The proposed provision went on to detail notice requirements to the Union for an opportunity to bargain over the effects of the decision.

Monti testified that he added subcontracting clause 19.3 because the Union had not provided necessary labor and Respondent had to supplement with subcontracting to satisfy its customer obligations. He later withdrew 19.3 entirely.

Further, Monti's November 18 proposal added new language under 11.2 (vacations), stating that a vacation day would be paid at 8 hours times current rate of pay for service technicians and 8 hours times a straight \$14 per hour for sunroom and window carpenters. Monti explained that this was meant to address service technicians, who would continue to receive hourly wages under Respondent's proposal.

Respondent's new proposal also made changes favorable to employees, as follows:

1) Raised its percentage of contract from 5 percent to 6 percent, adding "or minimum wage whichever is greater" (art. 8.1).

50 <sup>39</sup> Jt. Exh. 4.

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- 2) Provided that Respondent would provide either box truck or trailer attached to company vehicle (9.1), as opposed to prior language that it would provide a trailer (presumably to be attached to an employee's personal vehicle).
- 3) Provided that Respondent would furnish certain tools and equipment and a monthly tool allowance of \$50 to employees for maintenance of their own tools (9.3).
- 4) Raised from \$100 to \$135 Respondent's maximum monthly contribution to individual health insurance coverage premiums (12.1).

Yarger was present at this meeting. He argued that percentage of contract remuneration would hurt unit employees because of mismeasurements by measure technicians, problems with materials, and other problems occurring at jobs. Yarger emphasized mistakes in measuring by Bonfardine, who was not experienced as a measure tech. Monti replied that he would look into Yarger's claims. Queer stated that employees would still end up working for minimum wage under the 6 percent proposal, a conclusion with which Monti disagreed.

At this point, it is appropriate to address conflicting evidence regarding the percentage of installation jobs in which window installers encounter additional work because of mismeasurements by measure technicians or due to errors in materials. Yarger's testimony that approximately 30 percent of the jobs have incorrect measurements and another approximately 30 percent have incorrect materials sounds excessive. On the other hand, the testimony of Steve Grove, a subcontractor of Respondent, that the percentages for these problems are approximately 1 percent each, sounds too low. I find the most reliable evidence on this issue comes from Yarger's job logs, in which he recorded problems that he encountered on jobs between March 29, 2004, and February 21, 2005.<sup>40</sup> Out of approximately 99 jobs, he encountered no problems in about 46. In the remainder, various types of problems were noted, including such factors as weather and mechanical. Sixteen of the jobs, or approximately one-sixth, described problems related to either mismeasurement or sales persons' errors.

Queer sent Monti an e-mail the following day, stating that the employees were not happy with Respondent's (latest) proposal and that "[T]he '% of job[s]' has to go, and an hourly rate must be there for an agreement." He also said that the Union might be able accept the Geisinger plan for medical as long as the Company paid 100 percent of the cost for single or family coverage and that the Union might consider elimination of the tool allowance.

According to Monti, Queer called him a day or two after this and essentially confirmed what was stated in the e-mail. Queer allegedly further said that the Union was prepared to do whatever was necessary to get Respondent off percentage of contract, including picketing and going to the media. Queer denied saying this. The record supports the conclusion that the Union was frustrated by then by Respondent's unyielding position on percentage of contract and the lack of progress on negotiations, and on this point I find Monti's testimony to be more plausible and accept it. There is no evidence the Union ever in fact engaged in such actions.

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<sup>&</sup>lt;sup>40</sup> GC Exh. 31.

Rebo testified that in December, he had work for installers but trouble getting employees because they did not like to work in bad weather.<sup>42</sup> He discussed this with Monti, and they decided to use subcontractors. There is nothing in the record to indicate that in previous years. Respondent did not experience the same kind of difficulty and, in the absence of evidence to the contrary, it is logical to assume that that the problem was annually recurring. Three window jobs were subcontracted in December and several others later in the winter.

The next meeting took place on January 27, 2005. Respondent submitted a revised proposal in which it agreed to holiday pay as proposed by the Union.<sup>43</sup> Queer submitted a revised proposal for wages and fringe benefits, confirming that the Union would agree to Respondent's providing its own health insurance plan (Geisinger) and proposing certain contributions per hour for individual and family coverage.<sup>44</sup> Queer stated that this would result in significant savings for Respondent vis-à-vis the Union's health insurance plan. The Union insisted that Respondent pay 100 percent of the premiums for individual and family coverage,

Monti testified that the Union was adamant against percent of contract and said it would never work, and his notes stated that at the conclusion of the meeting, the parties were at an "impasse" over percent of contract. Queer, on the other hand, testified that at this meeting, the Union for the first time said it would consider percentage of contract if there was a floor above the minimum wage.

In this regard, Monti's notes were ambiguous, stating, "[T]he Union mentioned willingness to move on wages." This could have referred to more concessions on wage rate or to willingness to consider percentage of contract. The credibility of Queer's testimony that the Union, at least at some point, expressed willingness to consider percentage of contract is buttressed by the language in Monti's notes of the February 17, 2005 meeting that the Union requested, through the Federal mediator, that Respondent consider "increasing the floor on wages over minimum wage." Although the term "wages" was used, the statement makes sense only if the floor referred to percentage of contract and not an hourly wage. Indeed, the notes went on to state that "that wage would be very close to what the hourly workers are currently making," and that the Company denied the request. I find, therefore, that the Union in negotiations in early 2005 did express a willingness to entertain percentage of contract.

At the February 17 meeting, Monti presented another revised proposal, which eliminated subcontracting clause 19.3 and highlighted only the language in the Union's proposed articles 2.1 and 3.2 with which Respondent disagreed, thus returning to his pre-November 18, 2004 wording. During the course of the meeting, Monti dropped his longstanding objection to the language "in the future" in the union security clause (3.2), although stating that he felt it was unnecessary.

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<sup>45 42</sup> See R. Exh. 7, a memorandum Rebo sent to employees, asking if they preferred layoff or working through the winter months.

<sup>&</sup>lt;sup>43</sup> Jt. Exh. 9.

<sup>&</sup>lt;sup>44</sup> GC Exh. 12.

<sup>&</sup>lt;sup>45</sup> This is being considered for credibility purposes, not as substantive evidence.

<sup>&</sup>lt;sup>46</sup> Jt. Exh. 10.

Monti testified that the Union insisted this be a final contract and he responded that they had completely objected to percentage of contract but never offered alternatives. The Union said they would take it to employees but knew it would not be acceptable. Monti's notes for that meeting stated that negotiations ended with the parties "still at an impasse" over wages and insurance, with the Union being committed to hourly wages and 100 percent insurance. However, nothing in Monti's notes reflected that the Union said anything about this being a final contract or taking it to employees, statements I expect would have been important enough to be included. Their omission undermines Monti's testimony.

Further diminishing the reliability of Monti's testimony was the language in his cover page to Queer dated February 22, along with which he transmitted by e-mail a draft contract.<sup>47</sup> Monti stated that as per the Union's request, he was sending the draft contract that included all "tentative" agreements that had been made, with all highlighting eliminated. He asked Queer to notify him immediately if anything had been left out. Most importantly, he "invite[d] employees to consider the offer," language seemingly inconsistent with his claim that the Union had made the decision to present it to the membership. Moreover, as described below, Respondent's counsel's letter to the Union, dated the same day, contradicted Monti's testimony. Accordingly, I do not credit it.

Monti testified that after this, Respondent decided it could not do more and needed to move forward; if the Union was not willing to move on health care and percentage of contract, the only alternative was to lock out unit employees on March 1.

Respondent could not have made such a decision more than, at most, mere hours later, because by letter dated February 22, John Meyer, Respondent's attorney, informed Queer that:<sup>48</sup>

[T]he Company intends to lock out the bargaining unit effective March 1, 2005. The Company regretfully feels that this course of action is necessary in order to reach agreement on the outstanding issues, most notably the wage and insurance provisions. The Company encourages the Union to present the Company's most recent proposal to the unit and requests that the Union endorse the proposal. If agreement is not reached on this proposal, the company will lock out the employees March 1, 2005.

Somewhat paradoxically, the letter went on to say that the Company wished to meet in March to continue work toward an agreement. In any event, the language that the Company "encourages" the Union to submit the Company's most recent proposal to the unit does not comport with Monti's testimony that the Union had demanded Respondent present its final offer, which the Union would take to employees with the expectation that they would not accept it.

On March 1, Respondent proceeded to lock out unit employees, and the lockout has continued to date. Subcontractors are performing their work.

The parties met twice thereafter. The first meeting was on March 24, after the Union had filed charges accusing Respondent of excluding or changing items that had been agreed to, in its February 22 draft (R. Exh. 29).

<sup>48</sup> GC Exh. 13.

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<sup>&</sup>lt;sup>47</sup> R. Exh. 29.

Monti stated at the meeting that wages and health insurance were the key issues. Dingey suggested exploring health care premiums with a different provider. Monti agreed to investigate, and Queer said he would make the contacts. Dingey also suggested making crew leaders working foremen as a means of controlling labor costs. Monti said he would be willing to further discuss this, but it might create problems between union members.

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Monti sent Queer a letter dated March 28, purportedly confirming what occurred at the March 24 meeting.<sup>49</sup> By letter to Queer dated April 8, Monti stated that Respondent agreed with the Union that wages and health insurance were key to negotiating a contract and that Respondent was "no longer linking any outstanding proposals."<sup>50</sup> He further said that Respondent would end the lockout as soon as there was agreement on wages and insurance benefits. He continued to adhere to Respondent's position that employees be paid on a percentage of contract basis.

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The final meeting was on April 14. The parties further discussed using crew leaders as working foremen, with Monti repeating his concerns. He advised the Union that other health providers were similar in costs and coverage. He again asked for specifics of what provisions the Union contended had been omitted and also reaffirmed that the lockout would continue until agreement was reached on wages and health care.

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# "New" Kitchens and Subcontracting

In the January 2004 settlement agreement resolving the charges concerning the July 2003 layoffs, Respondent agreed to, inter alia:

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"[R]einstate all terms and conditions of employment as they existed on July 8, 2003, and cease using subcontractors to perform work traditionally performed by unit employees, excluding siding and basements. Therefore, the Respondent will have no limitation with regard to the subcontracting of work outside of the installation of Four Seasons sunrooms, new kitchens or the installation of replacement windows.

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At the February 5 bargaining session, the parties recognized "the work historically performed but not limited to, by the employees has been residential installation of windows, sunroom produce lines including repair and service work of those products."

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On February 19, the parties agreed to the following language:

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21.1 The Employer agrees not to sublet or subcontract any construction work or alteration work to any person, firm or corporation which is traditionally performed by bargaining unit employees i.e.,: sunroom and replacement window installations and new kitchens.

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According to Monti, he explained at that meeting that resurfacing kitchens did not come under the term "new kitchens," and the Union agreed. I find that testimony implausible in light of other evidence and other testimony of Monti himself and note the absence of any mention of the subject in his negotiations' notes for that date.

<sup>&</sup>lt;sup>49</sup> GC Exh. 14.

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<sup>&</sup>lt;sup>50</sup> GC Exh. 15.

Although Monti generally testified with confidence, he equivocated on when the Union first objected to refacing not being considered unit work: <sup>51</sup>

Well, they discussed it, but they—you know. I know that Mike Dingey was **never** happy, because **he was the one who kept on bringing it up**, but we discussed it, we agreed to it, and later, I think months later, is when it surfaced again. (Emphasis added.)

I find this testimony implicitly contradicted his earlier testimony that the Union on February 19 acceded to his position that Respondent could subcontract kitchen refacing work. The conclusion that the Union did not acquiesce in Respondent's position is supported by the fact that on July 30, Queer raised the issue by e-mail to Monti, stating that Dingey had heard that many few kitchen jobs were being subcontracted and saying or asking, "This was still supposed to be our work?" Monti also testified, on cross-examination, that in October, Dingey told him that the Union considered resurfacing to be new kitchen work, after employees had reported subcontractors were doing kitchens.

For the above reasons, I find that the Union never agreed that Respondent could subcontract kitchen refacing work. Indeed, no facts have been presented that would make such acquiescence logical from the Union's standpoint as the representative of unit employees.

David Renaud, the third most senior crew leader out of 12,<sup>52</sup> did primarily new kitchens and occasional resurfacing of kitchens prior to the 2003 layoff. Many jobs were not strictly one or the other but required both kinds of work.<sup>53</sup> After his recall, he did no kitchens at all, and his weekly hours went down. He asked Rebo why he was not doing kitchens, as he had before the layoff, since his recall letter stated things would be the same as before. Rebo replied that there had been an agreement, and it read "new cabinets." Renaud was never asked to work sunrooms.

As reflected in General Counsel's Exhibit 76, Respondent's use of subcontractors to perform kitchen work started before the recall of unit employees on April 15, 2004, and continued thereafter.

# Monti's Statements at Management Meetings

Rebo was Respondent's production manager until April 2005, when he went into his own business. He was an openly reluctant witness, displeased at being "forced" to attend by both counsel.<sup>54</sup> Because he was a former supervisory employee and is Shower's brother-in-law (their wives are sisters), and there is no evidence that he has ever been prounion, I conclude that he would have more incentive to testify in favor of Respondent than the Union.

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<sup>45 51</sup> Tr. 660.

<sup>&</sup>lt;sup>52</sup> See GC Exh. 29, list of employees by hire date.

<sup>&</sup>lt;sup>53</sup> GC Exh. 76 is consistent with his testimony. See fn. 34, supra.

<sup>54</sup> He said on the stand, "I'm forced to be here . . . . I don't want to be here" (Tr. 553).

Before the hearing, he made a motion to revoke Respondent's subpoena duces tecum. GC

50 Exh. 48.

His testimony, in fact, fully supported Respondent's position on most issues. The one major exception relates to his testimony about certain statements Monti made at monthly management meetings concerning negotiations, which statements Monti denied. Gray and Christopher Schmidt, Respondent's service manager at times material and now production manager, also testified about such meetings.

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The meetings were usually held on the fourth Wednesday of the month and concerned various management issues. At them, Monti gave status reports of scheduled negotiations with the Union and summaries of what had been discussed.

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According to Rebo, at two or three of these management meetings (he could not recall the dates), Monti stated that the Company "had moved on some small items . . . because we wanted to show a history of fair bargaining with [the Union], so that's why we were moving on some of those issues."<sup>55</sup> Rebo further testified that Monti said the Union "would never go for [percentage]," but the Company could not move on it."<sup>56</sup>

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The statements Rebo made in his NLRB affidavit, which he affirmed, comported with his testimony: "He would tell us that he wanted to show a history of fair negotiations by moving on small items, but he never planned on moving [on] the key item, the percentage. He might go one more percent, but they wouldn't go for it."<sup>57</sup>

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Schmidt and Gray also attended these meetings. Schmidt testified that Monti would speak for as long as 5 minutes on the subject of negotiations but professed absolutely no recall of anything Monti said—testimony I find incredible. Gray, on the other hand, recalled a credible number of topics, such as Monti mentioning agreement on compensation for carpenters using their own vehicles to drive to jobsites and stating that the Company was negotiating to pay a percentage of contract or minimum wage, whichever was greater. Gray's testimony was not incompatible with Rebo's.

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I credit Rebo's testimony—supported by his affidavit—over Monti's denial. As already stated, I do not believe that Rebo had any inclination to slant his testimony in favor of the Union or to fabricate the above statements he attributed to Monti.

# Summary of Events

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1997 and 2000—Union had contact with unit employees. Showers knew of this. He told employee Yarger in the summer of 1997 that employees who attended a union meeting would be fired, and he threatened to subcontract work and make the men responsible for their own tools and work vehicles.

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About February 2003—Rebo presented unit employees with a voluntary program that would reduce their hourly wage but provide them with a commission based on percentage of job, as well as have them purchase and use their trucks and receive compensation for mileage. Only one employee expressed an interest in participating.

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Spring 2003—Union began organizing activities.

<sup>&</sup>lt;sup>55</sup> Tr. 222.

<sup>&</sup>lt;sup>56</sup> Tr. 222–223.

<sup>50 57</sup> Tr. 224.

Sometime that spring—Showers held meetings with at least some employees, in which he spoke against the Union and stated that "no good would come from having a union contract."

July 8—Election was held, at which 21 of 22 employees who voted without challenge voted for the Union. With one exception, all employees who voted wore prounion T-shirts.

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July 11 and 12—Respondent entered into its first two subcontracting agreements with independent contractors to have them perform unit work.

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July 21—Union was certified. On about that same date, Showers told Yarger that if the Union did not offer him a better deal than he was getting from his subcontractors, he would not deal with the Union. He further stated that the employees "had their chance, and they made their decision, and now he [was] through with them" and that the Union had tarnished the vote by handing out T-shirts that everyone but Bonfardine wore.

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Late July—Respondent laid off all unit employees and began using subcontractors to perform their work.

October 10—First negotiations held.

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October 30—Union's first proposal.

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November 10—Respondent's first proposal, including compensation at 5 percent of a job's contract price, divided equally among employees assigned to the job; unpaid holidays, vacations, and bereavement pay; and Respondent continuing to provide the same health care insurance coverage (50 percent of individual coverage, up to \$100/month).

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January 15, 2004—Parties executed settlement agreement relating to the mass layoff of unit employees in July 2003. It provided for reinstatement of employees by April 15 and backpay; for restoration of the status quo ante as of July 8, 2003; for Respondent to cease using subcontractors to perform work traditionally performed by unit employees; and for the replacement of subcontractors when Respondent reacquired the tools it had sold. As to bargaining, Respondent agreed to recognize the Union and "to bargain in good faith on all mandatory terms of bargaining with an intent to reach an agreement." A specific schedule for negotiations was set up.

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April 15—Unit employees returned.

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April 15 on—Respondent made changes in providing transportation and in compensation for travel time. Whereas prior to the July 2003 layoff, Respondent provided employees with company vehicles to get to jobsites and paid all gas and maintenance expenses, employees now often had to drive their own vehicles entirely at their own expense. Further, paid travel time was eliminated.

April 19 on—Respondent subcontracted work traditionally performed by unit employees.

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On about May 19—Respondent proposed providing employees a trailer to haul materials, something it had not earlier offered.

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May 29—Respondent stated it was putting the Union on notice of its intent to hire subcontractors on a temporary basis because of Respondent's backlog of work.

June 10—Parties reached agreement on "temporary arrangements" to continue Respondent's operations and bargaining, as a result of which the Union withdrew the charges it had filed concerning Respondent's change in travel benefits. Respondent was to pay employees \$25/day for each day they traveled to a job using their own vehicle, and they would be paid hourly for travel time one way. The six employees who had guit because of having to use their own vehicles were to be offered reinstatement.

Further, the parties arranged for the Union to refer "supplemental" carpenters to Respondent to reduce the need for subcontractors. Rebo hired only a couple of them. In the whole year of 2004, between both newspaper ads and union referrals, Respondent hired only seven new employees.

October 21—Monti presented a spreadsheet analysis of the Union's latest proposed package vis-à-vis Respondent's current labor costs and called the former "catastrophic." Respondent did not present any new proposal of its own.

November 18—Monti presented a revised contract proposal. Under union security and jurisdiction, Respondent essentially restated its prior position that their application be limited to its Philipsburg facility. Monti added a provision under vacations on how vacation time would be calculated, something not mentioned in previous articles of agreement (carpenters would get 8 hours times a straight \$14 per hour, whereas service technicians, who would continue to be paid per hour under Respondent's proposal, would receive 8 hours times current pay rate). Monti further proposed a whole new section on subcontracting (19.3), providing that the Respondent would be able to continue to use subcontractors to satisfy temporary manpower shortages if no unit employees were on layoff status.

For the first time since Respondent proposed 5 percent of contract price in October 2003, Respondent made a change in its economic proposal—raising the percentage to 6 percent and adding "or minimum wage." Respondent also proposed for the first time that it would provide employees with either box truck or trailer attached to a company vehicle (previous language only stated that Respondent would provide a trailer, presumably to be attached to an employee's personal vehicle). Further, Respondent now proposed providing certain tools and equipment and a monthly tool allowance of \$50 to employees for maintenance of their own tools. Finally, Respondent raised from \$100 to \$135 the maximum monthly contribution it would make to employee's individual health insurance premiums.

December—Respondent used subcontractors to get "a couple" of window jobs done.

January 27, 2005—Respondent's proposal agreed to holiday pay as had been proposed by the Union. At this or the next meeting, the Union offered to consider percentage of contract compensation if there was a floor above the minimum wage.

February 17—Respondent's revised proposal eliminated the new subcontracting provision it proposed on November 18. Monti agreed to the full text of the Union's proposed union security clause.

February 22—Respondent's attorney advised the Union that "in order to reach agreement on the outstanding issues, most notably the wages and insurance provisions," Respondent would lock out unit employees on March 1 unless they ratified Respondent's latest contract proposal.

March 1—Respondent locked out unit employees.

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March 24—In further negotiations, the parties agreed that wages and health insurance were the key issues.

April 14—At their last meeting, Monti stated that the lockout would continue until agreement was reached on wages and health care.

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At two or three management meetings held on unspecified dates during negotiations — Monti told mangers that the Company had moved on "small items" in order to show a history of good faith bargaining, that the Company would not change from its percentage of contract offer, and that the Company knew the Union would never accept it.

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# Discharge of William Jones Jr.

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I now turn to the first of the two alleged individual discriminatees. For an understanding of the context of Jones' discharge, a brief description of "scrap aluminum" is helpful. Aluminum for capping windows comes off a coil or roll in 2-foot wide sections. There is always a certain amount left over from a job. Larger pieces can be used on another job if there is a safe place to keep them so they will not get banged up or scratched. However, if they are folded up or rolled up, they normally end up getting "kinked" or scratched. Deciding whether a particular piece of metal is scrap or can be used again is not always easy because window size varies and aluminum can be different colored on each side.

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Jones was hired on April 14, 1997, and terminated on August 4, 2004, solely for allegedly taking company property in the form of scrap aluminum.<sup>58</sup> He started as a helper on siding and then became a helper on sunrooms and windows. He was promoted to crew leader in 2001 and returned after the layoff as a crew leader on windows. Prior to his discharge, his only two disciplines were warnings issued on May 4 and 5, 1999, for not wearing a company hat.<sup>59</sup>

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As did all but one employee who voted, Jones wore a prounion T-shirt on the day of the election. He also wore it to work a couple of times after returning from layoff in April 2004, and this was known to management, as reflected in a May 12, 2004 e-mail from Human Resources Director Connie Ireland to Monti.<sup>60</sup> Therein, Ireland stated that Jones had been observed wearing an orange union shirt as he drove a company truck into the parking lot that afternoon. She cited article 7.4 in the employee handbook, stating that a company shirt or jacket must be completely visible at all times, without exception.

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Rebo testified that he told Jones a couple of days later to make certain he had a company shirt on at all times. Jones did not recall such a conversation but recalled something was placed on employees' clipboards about the policy. In any event, Jones received no discipline as a result, and the incident has not been alleged as a ULP. The record does not reflect any other occasions when an employee's wearing of a noncompany shirt has been an issue.

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<sup>&</sup>lt;sup>58</sup> GC Exh. 18.

<sup>&</sup>lt;sup>59</sup> R. Exhs. 3 & 4.

<sup>&</sup>lt;sup>60</sup> GC Exh. 19.

On August 3, Jones parked his personal truck in an unauthorized spot in the company parking lot because he could not find a regular parking place. In the back of the vehicle was about 2 months' worth of scrap aluminum, some of which he had received from coworkers, that he planned to take for recycling. Included were three pieces of aluminum that were folded and boxed and had been there for about 2 weeks.<sup>61</sup>

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Dispatcher William Knepp observed the aluminum and reported this to Rebo, who called Jones and told him to report the following afternoon after work. He did so. Rebo and Grey accompanied him to his truck and had him open the back. Rebo told Jones he was interested only in the three large pieces and asked why they were in there. Jones responded they were junk. After seeing the material, Rebo discharged him. The termination form referenced section 701 of the handbook (theft or inappropriate removal or possession of property). Therein, Rebo stated, "I found purposely folded up large sheets of aluminum coil in the back of [the] truck some at least 8–10 feet long. The equivalent of several rolls of coil. Pictures on file to document this was in personal truck and material could not be used after being damaged like this."

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Rebo testified that he discharged Jones for "taking excessive amounts" of aluminum coil; his offense was in taking large and usable pieces of aluminum. Employees could take "little pieces" that were unusable, with size being the governing factor as to whether aluminum pieces were scrap or could later be used.

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Although we have photographs of the aluminum coil in issue, making a finding on their exact measurements is impossible. According to Rebo, they were 10 or 12' long (as opposed to what he stated in the report, 8–10' long) and almost 24" wide. Jones stated they were 10-12" wide. Yarger testified that the pieces narrowed from 8 inches wide to nothing. Gray testified on other matters but was not questioned about Jones' termination.

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Jones testified that he was not aware he was violating any policy, a contention supported by the fact that he carried the aluminum around in the back of his truck for about 2 weeks and parked in an area of the Company's premises where it was visible.

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His testimony that many employees took scrap aluminum was confirmed by Cook and Renaud, one of the most senior crew leaders. The latter testified without controversion that 6 months after he was hired in 1996, he and other crew leaders were told by Showers that they could keep scrap metal for themselves (this testimony was consistent with Jones' testimony that he had heard from other employees that Showers made such a statement). Renaud took scrap metal from jobsites when it was available. Cook, who was hired in October 2000, testified that carpenters were always allowed to keep scrap aluminum from jobsites, as opposed to other scrap materials that were supposed to be returned to the shop. He was not aware of any limit on the amount of scrap aluminum that employees could take, scrap material being anything cut off from the roll and too small to use on another project.

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As far as written policies, Respondent submitted an undated policy stating that excess material left over on a job must be returned to stock, to be evaluated as to usability, and that any violation of the policy constituted grounds for automatic dismissal.<sup>62</sup> Rebo could not recall whether it was posted in 2002 or 2003, or when it was taken down (although he testified it was not up in 2004).

<sup>&</sup>lt;sup>61</sup> See R. Exh. 10, photographs of the coils in the back of Jones' truck.

<sup>&</sup>lt;sup>62</sup> R. Exh. 9. It specifically mentioned "old windows, doors, and any lumber" but not aluminum per se, consistent with Cook's testimony in the preceding paragraph.

There is nothing in the record showing that Respondent ever issued written or oral guidelines on what was or was not "scrap" aluminum, or that any other employee has ever been discharged or otherwise disciplined for taking left over aluminum or other materials from jobsites,

#### Demotion of Ashley Cook

Cook was hired as a helper in October 2000. On September 19, 2001, Rebo promoted him to crew leader effective September 24, 2001.<sup>63</sup>

In addition to wearing a union T-shirt on the day of the election, Cook had a union sticker (measuring about 2 inches by 2 inches) on his truck, which he parked in the company parking lot when he went to work. Cook also participated on behalf of the Union in negotiations from approximately September or October 2003 until September 2004, when he returned to work.

Along with all other unit employees, he was laid off in July 2003 and, pursuant to the settlement agreement, offered recall in April 2004.<sup>64</sup> At that time, doctors had placed him on light duty status as a result of a work injury. When he told this to Rebo, the latter responded that he had no light duty for Cook but for Cook to call him when he was released. In about late August 2004, Cook did so.

Prior to his reporting to work, Cook was told he would be working with Renaud, a crew leader. Cook subsequently worked as Renaud's helper on windows throughout the period from September 2004 until the lockout on March 1, 2005.

On his first paycheck, Cook received the same crew leader pay as he had before the layoff. However, he did not get the \$1/hour increase he expected, based on his understanding that crew leaders received such a pay increase after being a crew leader for 2 years. Cook testified that there had been a policy posted about the \$1/hour increase. He could not recall when it was taken down but believed it was after his promotion to crew leader.

Cook called Rebo, who responded in a phone message stating that there were no raises being given that year, that Cook was made a crew leader after the policy of giving a pay increase to crew leaders was no longer in effect and, finally, that Cook was now working as a helper but would continue to receive crew leader pay.<sup>65</sup>

Rebo testified that Cook was brought back as a helper in 2004 because Respondent had an excess number of crew leaders and very few helpers had returned. Further, Cook was one of the last carpenters promoted to crew leader and one of the last to come back because of his injury.

Respondent provided a pay increase form for Joe Hoover, dated May 20, 2003, in which he received a 2-year crew leader raise "based on old pay program. Last [crew leader] in line for this." Rebo testified Respondent instituted a new program after that. There is no evidence that anyone after Hoover received a pay increase.

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<sup>&</sup>lt;sup>63</sup> GC Exh. 26.

<sup>&</sup>lt;sup>64</sup> See his recall letter, Jt. Exh. 11.

<sup>&</sup>lt;sup>65</sup> GC Exh. 17 is the transcript of this message.

<sup>&</sup>lt;sup>66</sup> GC Exh. 24. Hoover had not yet been a crew leader for 2 years; the document reflects that he became a crew leader effective August 6, 2001.

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## Analysis and Conclusions

# Subcontracting of Unit Work

Subcontracting of work is a mandatory subject of bargaining when the only change is substitution of one group of employees for another, with no change in the scope, nature, and direction of the business enterprise. *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964); *Gaetano, Diplacidi & Associates, Inc.*, 344 NLRB No. 65 (2005); *Torrington Industries, Inc.*, 307 NLRB 809, 810 (1992). In such a situation, an employer is required to provide a union with adequate notice and an opportunity to negotiate over the decision and its effects. See the cases cited immediately above.

The Board has recognized only two limited exceptions to this general rule: when a union has engaged in tactics designed to delay bargaining, a factor not applicable in this case; and "when exigencies compel prompt action." *Bottom Line Enterprises*, 302 NLRB 373 (1999). The employer who claims the latter bears a heavy burden of showing "extraordinary events which are 'an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action." *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995), quoting *Angelica Health Care Services*, 284 NLRB 844, 852–853 (1987); see also *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995); *Bottom Line Enterprises*, above. Respondent relies on the latter exception.

It is undisputed that on April 19, 2004, Respondent entered into a subcontract for windows, and on April 27 and 28, entered into two subcontracts for sunroom installations. Although Monti, at the May 19 meeting advised the Union that Respondent wished to utilize subcontractors, it was not until May 29 that he put the Union on notice of Respondent's intent to use them. The subject was negotiated to agreement on June 10.

Respondent contends that it had a cash flow problem when employees returned in April 2004, and over one million dollars in backlog, representing work that the Company had contracted to perform but had not yet started. The backlog was especially severe for sunroom jobs. There were an insufficient number of recalled employees to perform this work because most of them did not come back or quit and Respondent had no choice but to subcontract.

However, Respondent has not shown that the economic situation in April and May suddenly became so serious that immediate subcontracting was required and, therefore, has failed to demonstrate "exigent circumstances" excused it from providing the Union with notice and an opportunity to bargain.

I consider another factor to be of great significance: Respondent bore major responsibility for any labor shortage it experienced in April 2004, and thereafter. It laid off without explanation all unit employees en masse in July 2003, just days after the Union won the election and was certified. When Respondent recalled them starting in April 2004, pursuant to the terms of a settlement agreement providing that the status quo ante be restored as of July 8, 2003, it imposed more onerous conditions relating to transportation. The record establishes that many, if not most, employees who were so recalled either declined reemployment or quit shortly after they came back because they were required to use their personal vehicles at their own expense to get to jobsites.

In sum, I conclude that Respondent has failed to show that but for its own actions, it would have suffered a serious labor shortage. None of the Third Circuit Court of Appeals cases cited in Respondent's brief dictate a contrary result.

As far as the time period for the violation, I will consider Monti's May 29, 2004 letter "notice," even though it was misleading in that it suggested the utilization of subcontractors was prospective rather than a fait accompli.

Accordingly, I conclude that Respondent violated Section 8(a)(5) and (1) by subcontracting out unit work (window installation and sunrooms) from April 19, 2004, until on about June 1, 2004, without affording the Union notice and an opportunity to bargain.

Turning to the matter of kitchens, employees prior to the July 2003 layoff performed both the installation of new kitchen cabinets (removal of existing cabinets and replacement with wholly new cabinets) and the resurfacing or remodeling of existing kitchen cabinets, frequently doing both kinds of work on the same job. The record does not reflect that prior to July 2003, Respondent ever took the position that unit employees should not perform kitchen resurfacing or remodeling jobs.

Respondent has contended that that the terms of the January 15, 2004 settlement agreement entitled it to subcontract such jobs. However, In that agreement Respondent agreed to restore the status quo ante and to "cease using subcontractors to perform work traditionally performed by unit employees," which included "new kitchens." Thus, by its terms, the agreement was meant to restore to recalled unit employees all of the work they had previously preformed, which included resurfacing kitchens, On February 19, the parties agreed to similar language to be included in a contract. The Union never acquiesced in Respondent's position.

I conclude in all of these circumstances that the "new kitchen" jobs subcontracted by Respondent after April 15, 2004, were in fact unit work.

Respondent has essentially refused to negotiate further on the subject, as reflected by Monti's July 30, 2004 e-mail response to Quinn that the settlement agreement allowed Respondent to subcontract resurfacing work. This e-mail constitutes the earliest reliable evidence that Respondent unequivocally advised the Union of Respondent's position that kitchen cabinet refacing was work that could be subcontracted. Inasmuch as it followed Quinn's query of whether subcontractors were doing kitchens, I conclude that this e-mail did constitute notice of subcontracting.

Therefore, I conclude that Respondent unilaterally subcontracted out kitchen work that had previously been performed by unit employees, without affording the Union notice from April 15 until July 30, 2004, and without affording the Union an opportunity to bargain since April 15, 2004.

# **Evidence of Animus**

Whether Respondent had antiunion animus is a critical factor in analyzing whether Respondent unlawfully engaged in surface bargaining, locked out unit employees on March 1, 2005, and took actions against employees Jones and Cook.

The record is replete with evidence of animus, both express and inferred. The former came from the pinnacle of Respondent's hierarchy, to wit, president and sole owner Bob Showers. Showers in 1997 told Yarger that he would fire employees who went to a union meeting, and he threatened to subcontract unit work. In the spring of 2003, he told Cook that "no good would come from having a union contract." On about the day of election, July 8, 2003,

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Showers told Yarger that the employees "had their chance and made their decision and now he [was] through with them" and, in so many words, that he would use subcontractors in their place.

There is also abundant inferential evidence of animus. Not before me as such is the legality of Respondent's mass layoff of unit employees following the Union's certification. Neither is the issue of whether or not Respondent violated the terms of the settlement agreement it entered into to resolve the ULP charges the Union filed; in particular, by implementing adverse changes in providing transportation and paying for travel time.

Nevertheless, matters that are the subject of a settlement agreement may be examined and used as background evidence to evaluate postsettlement conduct. *Lawyers Publishing Co.*, 273 NLRB 129, 134 at fn. 4 (1984), reversed in part & remanded 793 F.2d 1062 (9th Cir. 1986). In this regard, the settlement agreement specifically included the provision that the General Counsel "reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned case(s) for any relevant purposes in the litigation of this or any other case(s), and a judge, the Board and the courts may findings of fact and/or conclusions of law with respect to said evidence." By signing such an agreement, Respondent became bound to its terms, including that one. *Outdoor Venture Corp. (0.V.C.)*, 327 NLRB 706, 709 (1999).

Only days after 21 out of 22 nonchallenged employees voted for union representation on July 8, 2003, Respondent laid off en masse all unit employees even though the summer months are the busiest time of year in the industry. There is no evidence of any prior mass layoffs. Related to this, Showers first entered into agreements with subcontractors to perform unit work just 3 and 4 days after the Union won the election and even before it was certified. Respondent has produced no documentation to show that it had ever previously subcontracted unit work.

It is well settled that the timing of an employer's actions in relation to known union activity can constitute reliable evidence of unlawful motive. *Gaetano, Diplacidi & Associates, Inc.*, 344 NLRB No. 65 (2005); *Davey Roofing, Inc.*, 341NLRB No. 27, slip op. at 2 (2000). Here, the timing of the mass layoff and of entering into contracts with subcontractors to perform unit work as a reaction to the employees' voting for union representation was "stunningly obvious" and, in the absence of any other explanation for the timing, strongly infers antiunion animus. See *Gaetano, Diplacidi & Associates,* also involving an employer that laid off all employees within days of the union's certification and replaced them with subcontractors.

Moreover, although Respondent agreed in settlement of the layoff to restore the status quo ante as it existed on July 8, 2003, Respondent changed the terms and working conditions of unit employees when they returned starting in April 2004, by requiring them to use their personal vehicles without compensation and by no longer paying them for travel time. This constitutes further inferential evidence of animus.

# **Bad Faith Bargaining Allegations**

As the Board stated in its recent decision in *Regency Service Carts, Inc.*, 2005 WL 2170058 slip op. at 1 (Aug. 27, 2005), under Section 8(d) of the Act, an employer and its employees' representative are mutually required to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but

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such obligation does not compel either party to agree to a proposal or require the making of a concession . . . . " Atlanta Hilton & Tower, 271 NLRB 1600, 1603 (1984), quoting NLRB v. Herman Sausage Co., 275 F.2d 229, 231 (5th Cir. 1960). Although this obligation does not require either party to agree to a proposal or make a concession, "both the employer and the union have a duty to negotiate with a 'sincere purpose to find a basis of agreement." Atlanta Hilton, ibid; Regency Service Carts, supra. The totality of a party's conduct, both at and away from the bargaining table, must be examined to determine if it bargained in good faith. St. George Warehouse, Inc., 341 NLRB 904, 906 (2004); Public Service Co. of Oklahoma (PSO), 334 NLRB 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003).

Several factors are considered when evaluating a party's conduct for evidence of bad faith or surface bargaining without intention of reaching agreement. These include delaying tactics, the nature of the bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meetings. Regency Service Carts, supra; Atlanta Hilton & Tower, supra at 1603. The key is whether a respondent's conduct in its entirety reflects an intention to avoid reaching an agreement. Regency Service Carts; Altorfer Machinery Co., 332 NLRB 130, 148 (2000).

Although the Board does not evaluate whether particular proposals are acceptable or unacceptable, it will examine proposals when appropriate and consider whether, on the basis of objective factors, bargaining demands constituted evidence of bad-faith bargaining. *Regency Service Carts*, surpa, slip op. at 3; PSO, supra at 487.

The General Counsel contends that Respondent's specific conduct at three meetings violated Section 8(a)(5) and (1), and I will address them individually before then deciding whether Respondent engaged in surface bargaining in general.

First, we have the statement the Union attributed to Monti at the October 21, 2004 meeting, that he would not present an economic proposal because a ULP charge had been filed. Even if said, such a statement did not affect the course of bargaining in any way. Economic issues were discussed at the meeting, and Respondent did present an economic proposal at the following meeting, effectively mooting it out.

Second, the General Counsel alleges that Respondent engaged in surface bargaining when, on November 18, 2005, it reneged upon already agreed-upon contract provisions, specifically, those concerning recognition of the Union, union security, vacations, and subcontracting.

As to recognition and union security (arts. 2 and 3, respectively), Monti apparently from the start raised objections to particular language in those clauses, specifically, "may in the future" in recognition, and "jurisdiction" of the Union in the union security clause, because he sought to limit coverage to Respondent's sole existing facility in Philipsburg. He in essence restated this position in his November 18 proposal, and I do not find this constituted a retraction of any prior agreements.

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On vacations (art. 11), the September 7 articles of agreement show that they had been agreed to by that date. Respondent's November 18 proposal did not retract any of those provisions but added a new provision, on how vacation pay would be computed for service technicians, who would continue to be paid on an hourly basis, vis-à-vis carpenters, who would be paid percentage of contract. The September 7 articles of agreement was silent on the matter of calculation of vacation pay, and there is no evidence that the parties ever reached agreement on the subject prior to November 18. Therefore, I conclude that Respondent's insertion of that new provision did not amount to reneging or bad faith bargaining but rather to a proposal on a matter that had not previously been specifically addressed.

Finally, Respondent added a whole new provision to the subcontractor clause (art. 19), to which there earlier had been full agreement. Most significantly, it stated that the parties recognized that the Company "traditionally subcontracted bargaining unit work, (sunrooms, replacement window installations, and new kitchens) when the Employer has faced temporary shortage of manpower, or in exigent circumstances" and that Respondent would be able to continue to use subcontractors to satisfy temporary manpower shortages as long as no bargaining unit employees were on layoff status.

I conclude that by throwing in this new provision, Respondent effectively reneged on its prior agreement on subcontracting language and, further, evidenced bad faith. The whole matter of subcontracting was integrally connected from the start with the mass layoff of employees in July 2003, and their replacement with subcontractors. The settlement agreement resolving the layoff specifically provided for the phasing out of subcontractors and the resumption of bargaining unit work by unit employees. This new provision did not offer a concession or clarify anything previously agreed to. What it did was to basically rescind the agreement Respondent had previously reached with the Union on subcontracting language and essentially undercut a key provision in the prior settlement agreement.

I conclude, therefore, that by adding new proposed subcontracting language on November 18, 2004, Respondent reneged on terms previously negotiated with the Union and thereby violated Section 8(a)(5) and (1) of the Act by bad faith bargaining.

Third, the General Counsel contends that Respondent engaged in bad faith bargaining when, on February 22, 2005, it insisted to impasse that employees ratify its last wage and health insurance benefits proposal, knowing that its percent of contract wage proposal would be rejected.

Impasse is defined as a situation where "good faith negotiations have exhausted the possibility of reaching an agreement." *Taft Broadcasting*, 163 NLRB 475, 478 (1967), enfd. sub nom *AFTRA v. NLRB*, 375 F.2d 622 (D.C. Cir. 1968); Anderson Enterprises, 329 NLRB 760 (1999). The party asserting impasse has the burden of proof on the issue. *Newcorp Bay City Division*, 345 NLRB No. 104 (2005); *L.W.D., Inc.*, 342 NLRB No. 97, slip op. at 1 (2004); *Outboard Marine Corp*, 307 NLRB 1333, 1363 (1992). It must show that further good faith bargaining would have been futile. *Outboard Marine Corp.*, ibid; *Hotel Roanoke*, 203 NLRB 182, 182–184 (1989).

The record does not support a conclusion that there was genuine impasse on February 22, 2005, the date when Respondent, through counsel, threatened to lock out employees on March 1, if they did not ratify a contract based on Respondent's last offer. Earlier that same day, Monti had sent Queer a draft contract that included all "tentative" agreements that had been made, with all highlighting eliminated. He asked Queer to notify him immediately if anything had been left out. Counsel's letter itself paradoxically stated that the Company wished to meet in March "to continue work toward an agreement."

Even after the March 1 lockout, the parties had negotiations, on March 24 and April 14. At the former, the Union suggested checking the health care premiums of another provider and that crew leaders be made working foremen as a means of controlling labor costs. Monti was amenable to further discussion on these matters. They were both discussed again at the April 14 meeting, although no agreements were reached.

At some point in negotiations shortly before the lockout, the Union indicated that it might be willing to consider percentage of contract if there was a floor over the minimum wage.

Simply put, based on the above, I do not conclude that there was a genuine impasse as of February 22, 2005. Even had there been one, it would have resulted from Respondent's engagement in surface bargaining, not a failure of the parties to reach agreement despite mutual good faith bargaining.

I conclude, therefore, that Respondent's declaration of impasse was premature and violated Section 8(a)(5) and (1) on that basis. See *ConAgra, Inc.*, 321 NLRB 244 (1996); *Anderson Enterprises*, supra. In light of this conclusion, I need not address the General Counsel's argument that Respondent's violation was in insisting on a percentage of contract provision it knew would be unacceptable to the Union, or determine how being paid percentage of contract would have affected employee compensation.

## Surface Bargaining

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Although not in so many words, the General Counsel essentially contends that throughout the bargaining that lasted 1-1/2 years, Respondent engaged in surface bargaining without a good faith intention to reach agreement on a contract. In the absence of any reason to believe otherwise, it is only logical to assume that Respondent's motivation remained constant and did not shift at some point in the bargaining process.

In the circumstances of this case, what occurred outside the bargaining table is of considerable importance in reaching the conclusion that Respondent did not bargain in good faith but engaged in surface bargaining.

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I will not at this point reiterate all of the animus expressed by owner Bob Showers but note that many of his threats to employees were that he would get rid of them and replace them with subcontractors.

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Respondent's conduct outside the bargaining table showed a pattern of undermining its relationship with the Union, starting with the unexplained mass layoff of all unit employees in late July 2003, just days after the Union was certified as their collective-bargaining representative. Respondent and the Union entered into a settlement agreement resolving charges the Union had filed on the layoff. This settlement agreement provided for restoration of the status quo ante as it existed on July 8, 2003, and for restoration of unit work to unit employees. However, even at the time when employees were scheduled to return in April 2004, pursuant to that agreement, Respondent was entering into contracts for subcontractors to perform unit work, and it violated Section 8(a)(5) and (1) by not providing the Union with notice and affording it an opportunity to bargain over such subcontracting.

Moreover, those employees who did return pursuant to the agreement were not provided with company-supplied tools, full company-provided transportation to jobsites, or paid travel time, benefits they had previously enjoyed.

Turning to conduct at the bargaining table, Respondent's case is greatly damaged by the statements Monti made to managers that Respondent was basically going through the motions of negotiating and making small concessions in an effort to build a record of good faith bargaining when, in fact, Respondent was going to be adamant on percentage on contract with the expectation that the Union would never agree to it. Further Respondent's reneging on its agreement on the important issue of subcontracting, on November 18, 2004, over a year since the first bargaining session, also suggests bad faith bargaining in general, as does its premature declaration of impasse on February 22, 2005.

Other factors support the conclusion that Respondent engaged in surface bargaining. In the 1-1/2 years of bargaining, Respondent moved only slightly from its original proposals in the two areas that the parties ultimately agreed were critical for reaching agreement on a whole contract—wages and health care benefits. On wages, it went up 1 percent on percentage of contract (the minimum wage floor it also added was meaningless since Respondent is required to comply with the minimum wage laws regardless of whether its employees are represented). On health care, it raised by \$35 the maximum monthly health insurance contribution for individual coverage only.

I additionally note Respondent's somewhat misleading statements to the Union about the subcontracting of kitchen resurfacing work and its contention that new kitchen work did not include resurfacing cabinets, despite its own records showing many "mixed" jobs. Finally, I find suspicious the haste with which Respondent declared an impasse and threatened a lockout if employees did not ratify its last proposal.

Accordingly, I conclude that Respondent violated Section 8(a)(5) and (1) of the Act by engaging in surface bargaining without any intention of reaching an agreement.

#### The March 1, 2005 Lockout

The lead case in the area of post-impasse lockouts is Harter Equipment, Inc., 280 NLRB 597 (1986). See Bunting Bearings Corp., 343 NLRB No. 64 (2004). In Harter, the Board concluded that absent specific proof of antiunion motivation, an employer does not violate the Act by using temporary employees to engage in business operations during an otherwise lawful lockout, including a lockout initiated for the sole purpose of bringing economic pressure to bear in support of a legitimate bargaining position. 280 NLRB at 600.

I note initially that this is not a case where Respondent resorted to a lockout after the Union "had set the stage for economic warfare" and rejected the Respondent's offer. Contrast, Bunting Bearings Corp., supra at slip op. at 4. Here, there was no valid impasse reached, the Union never had a membership vote on ratification, and the Union showed a willingness to continue to further bargain over the critical issues of wages and health insurance benefits even after the lockout.

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My determination that Respondent engaged in bad faith bargaining during negotiations by reneging on an agreement on the important subject of subcontracting, engaging in surface bargaining, and prematurely declaring an impasse, precludes the conclusion that the lockout was legitimate. Indeed, allowing Respondent to lock out employees because of its own misconduct would lead to the untenable result of rewarding it for violating the Act. Put another way, the lockout was fruit of the poisoned tree of unlawful bargaining.

Even aside from anything that occurred during negotiations per se, the record demonstrates Respondent's pattern of antiunion animus, both express and implied, and its desire to get rid of unit employees because they voted for union representation. As the Supreme Court held in NLRB v. Brown, 280 U.S. 278, 288 (1965), independent evidence of improper motivation separate and apart from the lockout itself, converts what might otherwise be a lawful lockout into a ULP.

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In sum, I conclude that the lockout on March 1, 2005, was the culmination of Respondent's deliberate pattern of conduct designed to frustrate the collective-bargaining process and yet a further means of seeking to get rid of unit employees because of their union support. I therefore further conclude that the Respondent's lockout violated Section 8(a)(5), (3), and (1) of the Act.

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# Jones' Discharge

The framework for analysis in cases involving alleged discrimination against individual employees is Wright Line, 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under Wright Line, the General Counsel must make a prima facie 40 showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show by direct or circumstantial evidence that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of this animus.

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If the General Counsel establishes a prima facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. The burden of persuasion then shifts to the employer

to show that it would have taken the same adverse action even in absence of the employee's protected activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399–403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *Serrano Painting*, 332 NLRB 1363, 1366 (2000); *Best Plumbing Supply*, 310 NLRB 143 (1993). To meet this burden, "'an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of evidence that the same action would have taken place even in the absence of the protected conduct." *Serrano Painting*, supra at 1366, citing *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

Although the Board cannot substitute its judgment for that of an employer and decide what would have constituted appropriate discipline, the Board does have the role of deciding whether the employer's proffered reason for its action was the actual one rather than a pretext to disguise antiunion motivation. *Detroit Paneling Systems*, 330 NLRB 1170 (2000); *Uniroyal Technology Corp. v. NLRB*, 151 F. 3d 666, 670 (7th Cir. 1998).

Jones wore a prounion T-shirt on July 8, 2003, the day of the election, a fact known to owner Bob Showers and other members of management. He also wore such a shirt to the job a couple of times thereafter, including May 12, 2004, and management was also aware of this. Respondent demonstrated both express and implied animus and engaged in bad faith bargaining. Jones was discharged on August 14, 2004. The facts in this paragraph lead to the conclusion that the General Counsel has established a prima facie case of violation of Section 8(a)(3) with respect to Jones' discharge.

Respondent defends that Jones was terminated because he violated company policy by engaging in theft or unauthorized removal or possession of company material, in particular, the three large pieces of aluminum coil found in the back of his truck. According to Rebo, the small pieces of scrap aluminum in the truck were not a problem; Jones' offense was taking the three large pieces that could be used on other jobs.

The problem with this defense is that Respondent has not shown there was any kind of clear policy regarding what constituted "scrap" aluminum that employees could take from jobsites and sell. The only written policy that Respondent produced was an undated policy regarding excess material being returned to the shop for evaluation as to usability by a supervisor. It specified old windows, doors, and lumber but made no mention of aluminum, consistent with Cook's testimony that carpenters were always allowed to keep scrap aluminum from jobsites, as opposed to other scrap materials, which were supposed to be returned to the shop. Any reliance of Respondent on this "policy" is undermined by the fact that Rebo could not state when it was posted or for how long and that it was taken down before 2004.

Jones testified that he not aware he was violating company policy by taking the three coils, and the fact that he carried them around in the back of his truck for about 2 weeks and parked it in the company parking lot, lends credence to that testimony. Jones' further testimony that many employees took scrap aluminum and that there was no policy setting out what constituted "scrap" aluminum was confirmed by Cook and Renaud, one of the most senior crew leaders.

Respondent's failure to provide any evidence that any other employees were ever disciplined in any way for taking and selling aluminum from jobsites also sheds doubt on its contention that there was an enforced policy on the matter.

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I also note that Jones was a long-term employee, having been hired in 1997 and promoted to crew leader in 2001, and that his only prior disciplines were two warnings in 1999 for not wearing his company hat.

In light of all of the above factors, I conclude that Respondent has failed to rebut the General Counsel's prima facie case and that it violated Section 8(a)(3) and (1) by discharging Jones on August 4, 2004.

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#### Cook's Demotion

The first determination under *Wright Line* is whether the General Counsel has made out a prima facie case that Cook's demotion to helper after his return from layoff in September 2004, and Respondent's failure to provide him with a crew leader's wage increase after he was a crew leader for 2 years, were due to his involvement in union activities.

As with Jones, Cook wore a prounion T-shirt on the day of the election, a fact known to Bob Showers and other representatives of Respondent. In addition, he had a union sticker on his truck that he parked in the company parking lot when he went to work. Moreover, Cook attended bargaining sessions on behalf of the Union for approximately 1 year ending in September 2004, when he returned to work. The record contains ample evidence of Respondent's antiunion animus, both express and inferred. After his recall from the layoff, pursuant to the terms of a settlement agreement, Cook was not given his old position of crew leader but was demoted to helper. Although he continued to receive crew leader pay, the position of helper was more physically demanding and carried less responsibility than that of crew leader. The facts in this paragraph are sufficient to establish a prima facie case of discrimination.

Respondent defends that by the time Cook returned to work, there was a shortage of helpers and no need for additional crew leaders. In evaluating this defense, the context of Cook's return must be considered. Cook was a crew leader at the time of the mass layoff of unit employees in late July 2003, and the January 15, 2004 settlement agreement specifically provided that employees be reinstated to their former positions and made whole.

Respondent timely offered Cook reinstatement to his former position, but because of a work injury he was on light duty status. When Cook notified Rebo he was no longer limited to light duty, Respondent reinstated him. Thus, Cook's delay in returning to work was in no way imputable to any conduct by Respondent. Respondent was not obliged to hold a crew leader position open for Cook indefinitely. It did continue to pay him the pay rate he had received before. The General Counsel in its brief contends that Respondent could have sent Cook out as a second crew leader on jobs rather than as helper. However, Respondent does not appear to have had such a practice.

Were these the only relevant facts, I would find that Respondent has rebutted the General Counsel's prima facie case by showing it had legitimate business reasons for returning him as a helper. However, an additional factor must be taken into account: Respondent's use of subcontractors that began after the mass layoff of unit employees in July 2003, almost immediately after they nearly voted for union representation. This subcontracting continued throughout the year 2004, perhaps in derogation of the settlement agreement regarding the layoff. I must conclude that had Respondent not subcontracted a considerable portion of its work, a crew leader position would have been available for Cook upon his return in September 2004. In light of this, I further conclude that Cook's demotion was the indirect result of antiunion animus and therefore violated Section 8(a)(3) and (1) of the Act.

The last remaining issue is whether Respondent has shown that its failure to give Cook a \$1 an hour raise would have resulted even in the absence of his union activities. Respondent takes the position that the policy of giving such an increase to crew leaders had been eliminated and no raises were being given at the time he returned.

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Cook stated that there had been a policy posted and believed it was still posted when he was promoted to crew leader in September 2001, but he could not remember when such posting was taken down. Nothing documentary concerning a raise policy was introduced other than Hoover's pay increase in May 2003, after he had been a crew leader for less than 2 years, stating, "based on old pay program. Last [crew leader] in line for this."

Hoover's pay increase in May 2003 apparently predated the Union's organizing efforts in 2003 but, in any event, the change in policy referenced in his pay increase notice was never alleged as a ULP. In view of that language and the lack of evidence that any other crew leaders received such pay increases after May 2003 (or, for that matter, that there were any raises at all), I conclude that Respondent has rebutted the prima facie conclusion that Cook would have received a pay raise but for his union activities, even if he had remained continuously employed.

#### Conclusions of Law

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- 1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
  - 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

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3. By locking out unit employees, discharging employee William Jones Jr., and demoting employee Ashley Cook, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(3) and (1) of the Act.

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4. By locking out unit employees, subcontracting bargaining unit work without affording the Union notice and an opportunity to bargain, reneging on an agreement regarding subcontracting, prematurely declaring an impasse, and engaging in surface bargaining, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(5) and (1) of the Act.

# Remedy

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Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discriminatorily locked out employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of lock out to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

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Respondent having discriminatorily discharged William Jones Jr., it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent also must expunge from its records any references to Jones' discharge.

Respondent having discriminatorily demoted Ashley Cook, it must rescind the demotion and expunge from its records any references to his demotion. Upon his reinstatement as a locked out employee, Cook must be offered the position of crew leader.

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The General Counsel requests that Respondent be ordered to reimburse any employee entitled to a monetary award for any extra Federal, State and/or local income taxes that may result from the receipt of a lump sum backpay distribution in one tax year that represents backpay for more than one tax year. However, to date the Board has declined to adopt such an approach. See *Campbell Electrical Co.*, 340 NLRB 825, 827 fn. 11 (2003); *Paliotta General Contractors*, *Inc.*, 333 NLRB No. 80 at 3 (2001). Therefore, I will not include this in my order.

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Respondent must bargain in good faith with the Union as the exclusive collective-bargaining representatives of unit employees and, if an understanding is reached, embody it in a written signed agreement. The General Counsel has not requested that Respondent be ordered to reimburse the Union for negotiations expenses, and in the absence of such a request, I rely on the longstanding principle that a bargaining order, along with the usual cease-and-desist order and the posting of a notice, will suffice to induce Respondent to fulfill its statutory obligation to bargain in good faith. See *Regency Service Carts, Inc.*, supra; *Frontier Hotel & Casino*, 318 NLRB 857, 859 (1995), enf. denied sub nom *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997).

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Nor has the General Counsel requested a broad cease-and-desist order, but in any event, a narrow case-and-desist order appears sufficient. See *Regency Service Carts*, supra (Board issued narrow cease-and-desist order when respondent had engaged in "aggravated misconduct" that "infected the core of the bargaining process.")

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The General Counsel does seek an order requiring Respondent to restore unit work, including installation of kitchens and sunrooms, as it existed on and before July 8, 2003, the operative date specified in the January 15, 2004 settlement agreement resolving the ULP charges concerning the mass layoff of unit employees. In all of the circumstances I have previously set out in this decision, I deem this appropriate and will so order.

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On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended  $^{67}$ 

#### ORDER

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Respondent, Bob Showers Windows and Sunrooms, Inc., Philipsburg, Pennsylvania, its officers, agents, successors, and assigns, shall

<sup>&</sup>lt;sup>67</sup> If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

#### 1. Cease and desist from

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- (a) Locking out unit employees because of their union activities, after prematurely declaring an impasse in contract negotiations with the Greater Pennsylvania Regional Council of Carpenters a/w United Brotherhood of Carpenters and Joiners of America (the Union).
  - (b) Discharging employees because of their union activities.
  - (c) Demoting employees because of their union activities.
- (d) Unlawfully subcontracting unit work without affording the Union notice and an opportunity to bargain.
  - (e) Reneging on agreements reached with the Union during negotiations.
  - (f) Prematurely declaring an impasse in contract negotiations with the Union.
- (g) Engaging in surface bargaining with the Union, without the intention of reaching an agreement on a contract.
- (h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
  - 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days from the date of the Board's Order, offer unit employees locked out on March 1, 2005, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.
- (b) Within 14 days from the date of the Board's Order, offer William Jones Jr., full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.
- (c) Within 14 days from the date of the Board's Order, offer Ashley Cook full reinstatement to the position of crew leader (master carpenter), or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.
- (d) Within 14 days from the date of the Board's Order, remove from its files any references to the discharge of William Jones Jr., and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used in any way against him.
- (e) Within 14 days from the date of the Board's Order, remove from its files any references to the demotion of Ashley Cook, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used in any way against him.
  - (f) Bargain in good faith with the Union as the exclusive collective-bargaining representatives of the unit composed of all full-time and regular part-time master carpenters and assistant carpenters employed at Respondent's Philipsburg, Pennsylvania facility and, if an understanding is reached, embody it in a written signed agreement.

(g)	Restore unit work,	including insta	allation of	kitchens a	and sunrooms,	as it existed	on or
before July	y 8, 2003.						

- (h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- (i) Within 14 days after service by the Region, post at its facility in Philipsburg, Pennsylvania, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since April 19, 2004.
- (j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

30 Dated, Washington, D.C. December 14, 2005.

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	Ira Sandron Administrative Law Judge
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<sup>&</sup>lt;sup>68</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### **APPENDIX**

#### NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT unlawfully lock you out because of your activities on behalf of the Greater Pennsylvania Regional Counsel of Carpenters a/w United Brotherhood of Carpenters and Joiners of America (the Union), after prematurely declaring an impasse in our contract negotiations with the Union.

WE WILL NOT discharge you because of your activities on behalf of the Union.

WE WILL NOT demote you because of your activities on behalf of the Union.

WE WILL NOT subcontract your work without affording the Union notice and an opportunity to bargain.

WE WILL NOT during contract negotiations with the Union renege on agreements we previously reached on particular provisions.

WE WILL NOT prematurely declare an impasse in our contract negotiations with the Union.

WE WILL NOT engage in surface bargaining with the Union, with no intention of reaching an agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act, as set forth at the top of this notice.

WE WILL within 14 days from the date of the Board's Order, offer those of you who were locked out on March 1, 2005, full reinstatement to your former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to your seniority or any other rights or privileges previously enjoyed.

WE WILL within 14 days from the date of the Board's Order, offer William Jones Jr. full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL within 14 days from the date of the Board's Order, offer Ashley Cook full reinstatement to the position of crew leader (master carpenter), or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL within 14 days from the date of the Board's Order, remove from our files any references to the discharge of William Jones Jr., and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used in any way against him.

WE WILL 14 days from the date of the Board's Order, remove from our files any references to the demotion of Ashley Cook, and within 3 days thereafter, notify him in writing that this has been done and that the demotion will not be used in any way against him.

WE WILL bargain in good faith with the Union as the exclusive collective-bargaining representatives of the unit composed of the following employees and, if an understanding is reached, embody it in a written signed agreement: All full-time and regular part-time master carpenters and assistant master carpenters employed at our Philipsburg, Pennsylvania facility, excluding all office clerical employees and guards, professional employees and supervisors.

WE WILL restore to you work that you performed on and before July 8, 2003, including installation of kitchens and sunrooms.

		BOB SHOWERS WINDOWS INC.	AND SUNROOMS,
	_	(Employer)	)
Dated	By _		
		(Representative)	(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: <a href="https://www.nlrb.gov">www.nlrb.gov</a>.

112 Washington Place
Suite 510

Irgh, Pennsylvania 15219-3

Pittsburgh, Pennsylvania 15219-3458 Hours: 8:30 a.m. to 5 p.m.

# 412-395-4400. THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 412-395-6899.